SUPREME COURT, U. S.

Supreme Court

OF THE

United States

OCTOBER TERM, 19[illegible]

No. 1066

IRVING ROSEN and SIDNEY A. KANTER,
Petitioners,

vs.

EASTERN AIR LINES, INC.,
Respondent.

PETITION FOR REHEARING

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Petitioners IRVING ROSEN and SIDNEY A. KANTER, pursuant to the provisions of Rule 58(2) of the Rules of the Supreme Court of the United States, respectfully pray that this Court grant rehearing of its order dated the 7th day of April, 1969, which denied the petition for writ of certiorari filed in this case, and that the Court now grant certiorari.

This petition is based upon intervening circumstances of substantial or controlling effect relating to issues originally urged in support of the grant of the petition for writ of certiorari and which demonstrate the urgent need for a clear-cut pronouncement and resolution by this Court of an important question of Federal Law upon which Courts of Appeal in the several circuits are in conflict and substantial dispute.

The petition for writ of certiorari previously filed herein presented, *inter alia*, the following question (at p. 4):

> "3. Where an arbitrator, in an attempt ostensibly to interpret the provisions of a collective bargaining agreement, ignores and disregards the plain and unequivocal requirements of the agreement and denies an employee the benefits thereof, or acts with respect thereto in an arbitrary, capricious or unreasonable manner, may such conduct be reviewed and remedied by the Federal Courts?"

The petition for certiorari discussed the importance of this question raised by the Fifth Circuit's decision in this case and its impact upon the administration of justice in the Federal Courts. This issue arose by virtue of the decision of the Fifth Circuit to the indisputable effect that where questions of "interpretation" of the collective bargaining agreement or questions partaking of the aspects or characteristics of "interpretation" of the agreement have been decided by an arbitrator under the procedures of the Railway Labor Act, 45 U.S.C.A. §§ 151 et seq., and §§ 181-188 (as the same apply to air carriers)

such decisions are finally and absolutely foreclosed from judicial review and inquiry. On this basis the Fifth Circuit, and the District Court before it, made no attempt to consider or resolve the subsidiary questions and issues presented and raised before them of whether the arbitrator's decision and action had its foundation and base in the collective bargaining agreement, whether the arbitrator's interpretation of the contract, from which he derived the authority to act and rule as he did, was reasonably debatable, and whether such decision and action turned upon some contractual provision which was unclear or ambiguous to the point where it required interpretation by the arbitrator. Resolution of such issues was, of course, obviated by a blanket general ruling to the effect that this was strictly a "hands-off" area for the Courts.

Since the filing of the petition herein the Court of Appeals for the Third Circuit has entered its decision to the exact opposite effect in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123. Said decision was entered on January 14, 1969 but was not published until March 24, 1969, and was not available for use by petitioners when the petition herein was drafted or filed. Therein the Third Circuit defines the "threshold question" as: "What is the proper role of a court in reviewing an arbitrator's interpretation of the provisions of a collective bargaining agreement?" The Third Circuit's decision in *Ludwig Honold* is divided into two distinct phases of inquiry: first, whether the Courts may under, any circumstances, review the arbitrator's interpretation (and under just what circumstances court review is authorized and warranted); second whether the arbitrator's interpretation in the premises was of such nature as would compel in-

terposition of judicial action. We are not here concerned with the second aspect. It is in the first area of inquiry that the decisions of the Third Circuit and the Fifth Circuit below are at complete variance.

The opinion of the Third Circuit in *Ludwig Honold* proceeds upon an analysis of the basic philosophy enunciated by this Court in the case of *United Steelworkers of America v. Enterprise Wheel and Car Corp.* (1960) 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424, and the developing lack of uniformity in subsequent Circuit and District court decisions proceeding therefrom and the different "standards" which have emerged. The Third Circuit observed that while *Enterprise* "elevated the arbitrator to an exalted status" (i.e. there could be no interference with his award simply because a reviewing court might differ with him in his interpretation of the provisions of the contract), nevertheless the courts still "held a check-rein on him—confining his zone of action to the four corners of the collective bargaining agreement."

The Third Circuit, following a discussion of the differing applications and standards resulting from *Enterprise*, running the gamut those cases where court review was held available in certain limited areas to those where, like the Fifth Circuit below, there is permitted no review whatsoever of the arbitrator's interpretation, and following an evaluation of such decisions reached the conclusion (at p. 1128) that where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop . . . a reviewing court may disturb the award." Going one step farther (and this is a highly critical aspect) the Third Circuit reached a conclusion to the effect that if the lan-

guage of the collective bargaining agreement (not in isolation, but in light of all relevant circumstances) was "clear and unambiguous" the arbitrator would have no authority to disregard the same and any departure therefrom would authorize court review.

These are precisely the premises urged for consideration by petitioners in the Fifth Circuit which were ignored and avoided in the latter's decision, as aforesaid, and obviated by the conflicting rule of law established therein. They have, of course, been made issues herein and since there now exists a clear and express conflict of decisions between the Third and Fifth Circuits on an important question of federal law, it is appropriate that the question be reviewed by this Court.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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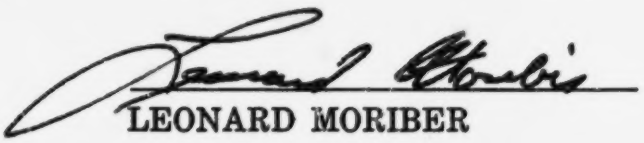
CERTIFICATE OF COUNSEL

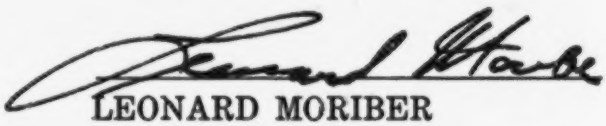
Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.



LEONARD MORIBER

CERTIFICATE OF SERVICE

I, LEONARD MORIBER, attorney for the Petitioners herein, and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 25TH day of April, 1969 I served copies of the above and foregoing Petition for Rehearing upon all counsel of record for the Respondent by mailing copies thereof in a duly addressed envelope with air mail postage prepaid to W. GLEN HARLAN, ESQ., Room 1401—10 Rockefeller Plaza, New York, N. Y. 10020, E. SMYTHE GAMBRELL, ESQ., GAMBRELL, RUSSELL, MOYE & KILLORIN, 4000 First National Bank Building, Atlanta, Georgia 30303, and WILLIAM G. BELL, JR., c/o Eastern Air Lines, Inc., Miami International Airport, Miami, Florida 33148.



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